September 9, 1959, the landlord and Respondent entered into an agreement wherein the landlord agreed: to foreclose its first (landlord's) lien; to cancel the leases; to preserve and protect the chattels of J F Coal Corporation during the foreclosure; at the foreclosure sale to bid for the chattels the amount of the landlord's lien plus any additional sum furnished by Respondent; and at the conclusion of the foreclosure proceedings to execute to a new corporation to be formed by Respondent new leases on essentially the same terms as the prior existing leases with J F Coal Corporation. Respondent in turn agreed to pay the landlord a sum measured by the past due rents and royalties owed the landlord by J F Coal Corporation, accruing minimum rentals during the period of foreclosure, and costs and expenses incurred by the landlord in the foreclosure, including the cost of preserving the property during such proceedings.

It was believed by all the parties on the date they made their contract, September 9, 1959, that the landlord's lien had priority over the lien of the Small Business Administration. Such, in fact and law, was the case on that date.

Prior to September 9, 1959, the Small Business Administration had not only acknowledged the landlord's priority to it, but prior to lending J F Coal Corporation $250,000.00 on its chattel deed of trust, requested the landlord to subordinate its statutory lien to any lien of the Small Business Administration. This request was refused by the landlord.

Subsequent to September 9, 1959, the Small Business Administration, in the landlord's foreclosure and lease cancellation proceedings in the United States District Court for the Southern District of West Virginia, initially admitted the landlord's priority by its answer. Thereafter, by amended answer, the Small Business Administration for the first time asserted a priority over the landlord.

After holding a hearing on the question of priority, the District Judge ruled that the landlord's lien was entitled to priority under West Virginia statutory law.

Thereafter this Court on December 5, 1960, handed down its decision in *Small Business Administration v. McClellan*, 364 U.S. 446 (1960). On the basis of this decision the United States District Court in West Virginia, feeling itself bound by the decision, and solely on this basis, vacated its prior order and determined that the chattel lien of the Small Business Administration had priority over the landlord's statutory lien. Thereafter at the foreclosure sale in May 1961, and subsequently, Respondent refused to perform his contract with the landlord.

Upon trial of the landlord's suit for breach of contract damages in the sum of $183,105.64, the state trial court in Arapahoe County, Colorado, dismissed the landlord's case at the conclusion of its evidence by giving retrospective effect to this court's decision in *Small Business Administration v. McClellan*, to hold that on September 9, 1959, the landlord did not have a first lien and that the belief of the parties as to the landlord's priority at the date of the making of the contract was a mutual mistake of the parties as to both law and fact which released Respondent from his obligations under the contract.

The trial court itself raised the federal question sought to be reviewed by its judgment of dismissal. No opportunity was given to the Petitioner to argue the question to the trial court since it dispensed with the filing of a motion for new trial. The trial court's opinion and judgment appear as Appendix D. The basis upon which the trial court dismissed the landlord's case had neither been asserted by the Respondent prior to commencement of litigation nor been pleaded by him in the trial court.

In the Petitioner's brief in the Colorado Supreme Court the question was raised by argument as to the effect of the

trial court's giving retrospective effect to the *McClellan* decision to cause a change in the settled law of West Virginia in force at the time of the making of the contract by the parties. A portion of Petitioner's brief in this connection appears as Appendix C. Oral argument to the same point was given the Colorado Supreme Court prior to its opinion. The matter was further called to the attention of the Colorado Supreme Court in Petitioner's Petition for Rehearing which appears as Appendix E. The Petition for Rehearing was denied.

(f)

Included in (e).

(g)

Not applicable.

(h) ARGUMENT

I

THE STATE COURTS' FINDING OF MISTAKE OF FACT AND LAW, BASED ON THEIR ERRONEOUS CONCLUSION THAT THIS COURT'S HOLDING IN THE *McCLELLAN* CASE APPLIED RETROSPECTIVELY TO THE CONTRACT HERE IN DISPUTE AND REQUIRED SUBORDINATION OF PETITIONER'S PREVIOUSLY VESTED LANDLORD'S LIEN TO THE SMALL BUSINESS ADMINISTRATION'S LIEN, DEPRIVED THE PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Prior to the present controversy and to the controversy in the West Virginia federal district court between the landlord and the Small Business Administration, it was the unchallenged and unquestionable rule of law in West

Virginia that a landlord's lien attached to a tenant's chattels when they were placed on the leased premises. *Mazo v. Burke*, 101 W. Va. 700, 133 S.E. 378 (1926); *Pepsi-Cola Bottling Co. v. Indian Rock Bottling Co.*, 98 W. Va. 269, 126 S.E. 715 (1925). Several of the leases which gave rise to the West Virginia federal court litigation between the landlord and the Small Business Administration antedated creation of the Small Business Administration in 1953. All the other leases involved were in existence prior to September 9, 1959. On that date, the day the contract here in issue was made, these parties and the Small Business Administration unanimously acknowledged that West Virginia statutes, as interpreted by the West Virginia Supreme Court, gave the landlord's lien priority on J F Coal Corporation's chattels over any lien created in favor of the Small Business Administration after the chattels were placed on the leased premises.

It must be borne in mind that the Respondent in this case was not a party to and did not participate in the lien foreclosure and lease cancellation proceedings in the United States District Court for West Virginia. Not until about fifteen months after the contract between the present parties was made did this Court announce its decision in *Small Business Administration v. McClellan*, 364 U.S. 446 (1960). Only thereafter did the federal district court in West Virginia, solely on the basis of its interpretation of *McClellan*, change the law of West Virginia applicable to that case and hold for the first time that the Small Business Administration's chattel lien should be given priority retrospectively to September 9, 1959, over the landlord's lien. From that federal trial court holding the Colorado state courts have inferred that the contract made between these parties on September 9, 1959, was unenforceable because based on a mutual mistake, *i.e.*, mutual belief that on that date the landlord's lien was prior to the Small Business Administration lien.

The present litigation was commenced in a Colorado state court by the landlord after the landlord completed its obligations under the contract but the Respondent failed to perform his obligations after demand. The action was for breach of contract, and after hearing the Petitioner's evidence, the state trial judge on his own motion introduced the "mutual mistake of fact and law" issue and dismissed the complaint without allowing a motion for new trial. The Colorado Supreme Court affirmed.

The net effect of the state court action in this case is totally to upset the reasonable expectations of the parties by retroactively applying to their contract a later change in the rules of law governing priorities of West Virginia liens. Thus the Petitioner's rights in her contract were deprived of value solely through retroactive misapplication of a judicial change of law.

It is elemental, of course, that a state may not deprive one of property without due process of law. U.S. Const. Amend. XIV. Lien rights and choses in action are included in the "property" protected. *Jensen v. Wilton E. Wilcox Lumber Co.*, 295 Ill. 294, 129 N.E. 133 (1920); 16A C.J.S. *Constitutional Law* § 631 (1956). Cf. *County of Los Angeles v. Superior Court*, 43 Cal. Rptr. 392 (2d Dist. Ct. of App. 1965); *Farmers Nat'l Bank & Trust Co. v. Berks County R.E. Co.*, 333 Pa. 390, 5 A.2d 94 (1939). Thus it is a violation of Fourteenth Amendment due process for a state to give a newly created lien preference over other liens already in existence. 16A C.J.S. *Constitutional Law* § 631 (1956).

It has long been settled that state action retrospectively changing the law so as to divest or diminish priorities of property rights previously vested constitutes a deprivation of property without due process. *Security-First Nat'l Bank v. Rindge Land and Navigation Co.*, 85 F.2d 557 (9th Cir. 1936); *In re Tennessee Pub. Co.*, 81 F.2d 463 (6th Cir. 1936); *Federal Farm Mortgage Corp. v. Berzel*, 69 N.D.

760, 291 N.W. 550 (1940). More recently this Court has recognized that due process protections against retroactive changes in state law apply not only to state legislative action, but also to state judicial action. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 84 Sup. Ct. 1697 (1964).

In essence what has occurred here is that a state court, by retrospectively changing the law, has destroyed the value of the Petitioner's contract and underlying landlord's lien. Because of restrictions under the due process clause, "A court cannot destroy vested property rights or create new property rights." 16 C.J.S. *Constitutional Law* § 216 (1956).

On this ground alone the Colorado Supreme Court's decision should be reversed and a new trial should be granted.

II

THE COLORADO COURTS ERRED IN HOLDING THAT THE DECISION OF THIS COURT IN *SMALL BUSINESS ADMINISTRATION v. McCLELLAN*, 364 U.S. 446 (1960), WAS A BINDING PRECEDENT IN THIS CASE AND HAD TO BE APPLIED TO INVALIDATE THE CONTRACT ON WHICH THIS ACTION WAS BROUGHT.

The Colorado courts disposed of this case on the theory that it was governed by a principle of federal law derived from this Court's opinion in *Small Business Administration v. McClellan*, 364 U.S. 446 (1960). It is the Petitioner's contention here that the interpretation and application of the *McClellan* precedent by the state courts below constituted decision by those courts of a federal question of substance not heretofore determined by this Court and in a way probably not in accord with the probable intention of this Court in rendering the *McClellan* decision.

As Petitioner understands the facts in *McClellan*, the basic question was a determination of whether or not the Small Business Administration as an instrumentality of

the United States was entitled to the statutory priority of the United States over other unsecured creditors in the administration of a bankrupt's estate. As Petitioner perceives the effect of this Court's decision therein, the Court determined simply that the Small Business Administration was entitled to the priority given to the government for debts owed the United States. *McClellan* did not consider or determine the priorities of liens under the laws of any state.

In effect the Colorado courts have attempted to predict how this Court would determine relative priorities between a West Virginia landlord's lien and a Small Business Administration chattel lien under the facts of this case. On the basis of the state court's prediction of what this Court might hold in such circumstances, the Petitioner has been deprived of the right to enforce her contract.

Petitioner submits that the Colorado courts have erred in holding that *McClellan* governs this case.

(i) OPINION OF COURT BELOW.

The opinion delivered upon the rendering of the judgment sought to be reviewed appears as Appendix A.

(j) OPINION AND JUDGMENT OF TRIAL COURT.

The trial court's opinion and judgment appears as Appendix D.

CONCLUSION

It is respectfully requested that, for the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the case should be remanded to the Colorado courts for a new trial or for reconsideration.

Respectfully submitted,

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APPENDIX A

OPINION OF COLORADO SUPREME COURT

Mary K. RYAN, Assignee,

Plaintiff in Error.

v.

Jack VICKERS, Defendant in Error.

No. 20806.

Supreme Court of Colorado.

In Department.

Oct. 4, 1965.

Rehearing Denied Nov. 8, 1965.

McWILLIAMS, Justice.

Mary K. Ryan, as the assignee of one E. M. Johnson and Metallurgical Coals Inc., a West Virginia Corporation, made claim against Jack Vickers for damages in the sum of $183,105.64 which allegedly resulted from Vickers' breach of contract. Upon trial, after Ryan had completed the presentation of her evidence, Vickers pursuant to Rule 41(b), R.C.P.Colo. moved for an involuntary dismissal of her claim for relief. This motion was granted and the trial court accordingly entered a judgment dismissing Ryan's claim. It is this judgment which by writ of error Ryan now seeks to reverse.

It is agreed that in resolving this controversy we must view the evidence in a light most favorable to the plaintiff, against whom the motion to dismiss was interposed and granted. See Union Pacific Railway Co. v. Shupe, 131 Colo. 271, 280 P.2d 1115.

Accordingly, Ryan's evidence established, at least *prima facie*, the following:

1. E. M. Johnson and Metallurgical Coals were the owners of certain land situate in the State of West Virginia, which land was under lease to the J F Coal Corporation, another West Virginia corporation;

2. this land was leased to J F Coal for the purpose of mining coal therefrom, and under the terms of the several leases J F Coal was obligated to pay E. M. Johnson and Metallurgical Coals certain rents, plus additional royalties on coal actually mined;

3. Jack Vickers and other members of his family, as well as certain of his business associates, were stockholders in J F Coal;

4. in the several months before September 9, 1959 J F Coal became hopelessly in debt to the tune of about one million dollars, as of that date owing, among others, E. M. Johnson and Metallurgical Coals about $75,000 in unpaid rent and royalties, and also owing the Small Business Administration some $250,000;

5. on September 9, 1959 Jack Vickers and his lawyer, held a meeting with E. M. Johnson and representatives of Metallurgical Coals, and their lawyer, the meeting being held in the home of E. M. Johnson in West Virginia;

6. this meeting was held at the request of Jack Vickers, who as of that time intended to form a new coal mining company and, in connection therewith, desired that E. M. Johnson and Metallurgical Coals lease to this new company, when formed, the same properties which were then under lease to the bankrupt J F Coal, such new leases to be on the same terms and conditions as the old ones;

7. at this meeting E. M. Johnson and Metallurgical Coals verbally agreed to lease these properties to the coal mining company which Jack Vickers was about to form, the terms of the leases to be the

same as the several leases then held by J F Coal, with a minor modification agreed to by the parties as to the notice required in the case of a default;

8. on this same occasion, and as a part and parcel of the foregoing verbal agreement, Vickers also verbally agreed to make E. M. Johnson and Metallurgical Coals "whole" as to the amount of the indebtedness of J F Coal to them for the unpaid rent and royalties, this promise to cover not only existing indebtedness but such further and additional indebtedness as might accrue until such time as the existing leases to J F Coal could be canceled and new leases given the company which Vickers proposed to form;

9. at this same meeting and also as a part and parcel of the verbal agreement between the parties, E. M. Johnson and Metallurgical Coals and their lawyer informed Vickers and his lawyer that as Landlords they not only held a landlord's lien on the mining machinery and equipment of J F Coal, which machinery and equipment was estimated to have a value of $500,000, but also that their lien under local law took precedence over all other liens or claims, including that of the Small Business Administration;

10. at this meeting of September 9, 1959 E. M. Johnson and Metallurgical Coals verbally agreed to take all necessary legal steps to immediately cancel the existing leases to J F Coal;

11. E. M. Johnson and Metallurgical Coals also verbally agreed to bid at the foreclosure sale of J F Coal's mining machinery and equipment to the extent of their first and prior landlord's lien and to also bid over and above the amount of their lien, if requested to do so by Vickers, all conditioned upon Vickers' furnishing the additional sums of money to support such additional and further bidding; and

12. upon September 24, 1959 a written memorandum embodying the terms of their verbal agreement was signed by the attorneys for E. M. Johnson and

Metallurgical Coals and Jack Vickers respectively, the attorneys having been empowered by the parties to sign the written memorandum in their behalf.

It was on the basis of an alleged verbal contract entered into by the parties on September 9, 1959 that Ryan, as assignee, made claim against Vickers for damage flowing from Vickers' alleged breach thereof, contending that her assignors had performed all of their obligations under the verbal contract, but that Vickers had failed to pay them for the unpaid rent and royalties due them from J F Coal.

Upon trial it developed that the landlord's lien of E. M. Johnson and Metallurgical Coals was *not* prior to the lien of the Small Business Administration, and on the contrary that the lien of the Small Business Administration had priority over their lien.

As already noted, when Ryan concluded the presentation of her evidence, the trial court upon motion dismissed her claim, holding that all parties to the agreement were of the "mistaken belief that the plaintiffs held a first lien on the property of J F Coal Corporation," all of which was held to be a mutual mistake of "both law and fact" which excused Vickers from performing his promises as called for by their agreement.

Vickers contends that such was quite proper for the reason that there was indeed a "mutual mistake of fact and law" in that all concerned were of the mistaken belief that E. M. Johnson and Metallurgical Coals had a first and prior landlord's lien on the mining machinery and equipment of J. F. Coal, when in fact they did not. As an offshoot of the foregoing, Vickers argues that Ryan's assignors did not perform their obligations under the alleged verbal contract in that they did not bid at the forced sale of J. F. Coal's machinery and equipment to the extent of their alleged first lien, or at all.

It is the basic position of Ryan that there was no "mistake," be it of fact or law, and that as of September 9, 1959 her assignors *did* have a landlord's lien against the machinery and equipment of J. F. Coal which took priority over all other liens or claims of the unpaid creditors of J. F. Coal, including that of the Small Business Administration. The fact that it later developed that their lien rights were inferior to those of the Small Business Administration represents, it is claimed, a "change in the law," rather than any mistake of law. It is asserted by Ryan that—as the law existed on September 9, 1959—there was a valid and enforceable contract, and that a contract which is valid and enforceable when made remains such even though there be a subsequent *change* in the law.

In our considered view the action of the trial court was under the circumstances quite correct and its judgment must therefore be affirmed.

There is no dispute but that as of both September 9, 1959 (the date of the alleged verbal contract between the parties) and also as of September 24, 1959 (the date when the written memorandum was signed by the attorneys for the respective parties) E. M. Johnson, the representative of Metallurgical Coals, and Jack Vickers, as well as their respective attorneys, were all of the belief that E. M. Johnson and Metallurgical Coals were possessed of a landlord's lien against the machinery and equipment of the bankrupt J. F. Coal which was a first and prior lien on such property and as such took precedence over any claim or lien of the Small Business Administration. Nor is there any dispute but that it was ultimately determined in the United States District Court for the Southern District of West Virginia that this belief was a mistaken one and that actually the Small Business Administration's lien was the first and prior lien against the machinery and equipment of J. F. Coal—and not the liens of Johnson and Metallurgical Coals.

We reject plaintiff's contention that the foregoing rep-

resented a "change in the law"—as opposed to a mistake—and that being only a change in the law the general rule that a contract will not be set aside where a subsequent decision by a court of last resort overrules a prior decision of the same court must prevail. We do not so view the matter. At least our attention has not been directed to any judicial declaration antedating September 9, 1959 — the date of the alleged verbal contract between the parties — which held that a West Virginia landlord's lien had priority over a lien of the Small Business Administration.

[1] And as already noted, when plaintiff's assignors later sought to foreclose their landlord's lien it was held that their lien was inferior to that of the Small Business Administration.

Hence, rather than any "change" in the law, we view this as a mutual mistake of law; or perhaps more accurately a mutual mistake as to the applicability of existing law to the factual situation here at hand, and that the mistake is of such nature as to constitute an exception to the general rule that a mistake of law will not vitiate a contract.

In 17 C.J.S. Contracts § 145, p. 900, such exception is discussed as follows:

> "To the general rule * * * that mistake of law is no ground for relief there are certain exceptions, or apparent exceptions. * * *
>
> "Mistake as to particular private rights may be treated as a mistake of fact, or as a mixed mistake of law and fact. Private rights of property, although they are the result of rules of law, or depend on rules of law applied to the construction of legal instruments, are usually considered matters of fact. * * *"

[2] The State of West Virginia would appear to be in accord with the foregoing principle that a mistake of law as to the nature or extent of one's private legal rights, interests or estates is deemed such a mistake of law and fact as to render unenforceable any agreement entered into with

reliance thereon. See Beard v. Callison, 133 W.Va. 121, 54 S.E.2d 568; Roberts v. Crouse, 89 W.Va. 15, 108 S.E. 421; and Tolley v. Poteet, 62 W.Va. 231, 57 S.E. 811.

That the "mistake" in the instant case is of such a nature is believed to be at once obvious. All parties mistakenly believed that Johnson and Metallurgical Coals had a first and prior lien against the mining machinery and equipment of J. F. Coal. Such is clearly a mistake as to the nature and extent of the rights and interests of Johnson and Metallurgical Coals in and to the machinery and equipment of J. F. Coal. Accordingly, under the foregoing authority, we hold that the mistake is of such nature as to avoid the agreement here sought to be enforced.

Plaintiff's further contention that any mistake, if such there be, related only to a legally inconsequential matter which was in nowise a material inducement to Vickers to enter into the agreement has been examined but found wanting.

To demonstrate the inapplicability of the argument, we note that the attorney for Johnson and Metallurgical Coals testified upon trial that at the meeting of the parties on September 9, 1959 he, on that occasion, made the statement that if Vickers paid Johnson and Metallurgical Coals that which was owed them by J. F. Coal, Vickers would then have the "benefit" of their claim against J. F. Coal and also that Vickers would then "have the right to a first lien, and he'll have the right to bid on it and as much more as he wants to bid."

Furthermore, in the written memorandum of September 24, 1959 plaintiff's assignors specifically promised to "bid on the said tangible personal property owned by the J. F. Coal Corporation to the extent of their first lien on the said property."

In this regard, it is sufficient to note that plaintiff's assignors did *not* have a first lien on the tangible property

of J. F. Coal; that Vickers did *not* have the "benefit" of any such first lien; and that Johnson and Metallurgical Coals did *not* bid on the tangible personal property of J. F. Coal to the extent of their non-existent first lien on such property. Under all these circumstances it is abundantly clear that the "mistake" in the instant case, instead of relating to an immaterial matter, relates to a matter which is most material and a very integral part of the agreement between the parties.

The judgment is affirmed.

PRINGLE, C. J., and SUTTON, J., concur.

APPENDIX B

EXCERPTS FROM WEST VIRGINIA CODE ANNOTATED (1961)

Section 11: "*Persons Liable For Rent*—Rent may be recovered from the lessee, or other person owing it, or the heir, personal representative, devisee or assignee, who has succeeded to the lessee's estate in the premises, but no assignee shall be liable for rent which became due before his interest began . . ."

Section 12: "*Distress For Rent;* Time and Place; Warrant—Rent may be distrained for within one year after the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by any sheriff or constable of the county wherein the premises yielding the rent or some part thereof may be or the goods liable to distress may be found, under a warrant from a justice founded upon the affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed."

Section 13: "*Property Subject to Distress*—The distress may be levied on any goods of the lessee, or his assignee or under tenant, found on the premises, or which may have been removed therefrom not more than thirty days . . . If any lien be created thereon while they are upon the leased premises, they shall be liable to distress . . ."

APPENDIX C

PORTION OF PETITIONER'S BRIEF IN THE COLORADO SUPREME COURT

The priority as a first lien of the Plaintiff's landlord's lien was not questioned by the parties throughout the transactions between them from September 9, 1959, until the decision by the United States Supreme Court in an unrelated case, *Small Business Administration v. McClellan, Trustee,* 364 U.S. 446, decided December 5, 1960. In the original agreement between the parties it is recited that the landlord's lien is a first lien, Plaintiff's Exhibit C, paragraph (4) (fol. 20). At the meeting between the parties on September 9, 1959, the Plaintiff Johnson stated that he had a first lien under the West Virginia statutes (fol. 198). His attorney, John Ray, at the meeting stated that he proposed to start a suit which would determine the priority of liens (fol. 203). In response to a question by Stallwitz, Ray replied Vickers would have the benefit of Johnson's first lien and Vickers would "have a right to bid on it and as much more as he wants to bid" (fol. 215). The Small Business Administration, prior to making a loan for $250,000 to J F Coal Corporation, recognized the priority of the landlord's lien in West Virginia by requesting E. M. Johnson to subordinate his landlord's lien to the chattel deed of trust to the Small Business Administration, which Johnson refused to do (fol. 225).

In preparing the action to foreclose the landlord's lien and to cancel the leases, filed by Ray in the Circuit Court of Nicholas County, West Virginia (Exhibit DD), allegations in paragraph 13 of the Complaint state that the Plaintiff's landlord's lien was first.

Vickers' attorney was not under any mistake. Stallwitz, in an effort to facilitate the foreclosure litigation, prepared on behalf of J F Coal Corporation an Answer to the Complaint (Exhibit EE). This Exhibit was not ad-

mitted into evidence on the ground that in preparing it Stallwitz was acting as an attorney for J F Coal Corporation rather than as the attorney for the Defendant. Attention is directed to paragraph 6 on page 2 of Exhibit EE where Stallwitz admitted the allegations of paragraph 13 of the Complaint, Exhibit DD, having to do with the landlord's lien being a first lien.

Ray readilly admitted that at the meeting of September 9, 1959, he had told Vickers and his attorney, Stallwitz, that the Plaintiffs had a first lien (fol. 381) and expressed the opinion that the landlord's lien had priority (fol. 398). "That's what Mr. Johnson stated to Mr. Vickers and Mr. Stallwitz." (fol. 382) Q. "And had you previously advised Mr. Johnson concerning the law of West Virginia relative to his landlord's lien?" A. "I had, but I didn't have to. Anyone that owns any land in West Virginia knows that the landlord's lien is a first lien in West Virginia." (fol. 382).

The trial court erroneously concluded that by reason of the *McClellan* decision in 1960 the parties to the present litigation were laboring under a mutual mistake of law and fact. It is again submitted that the belief that the landlord's lien was a first lien was neither a mistake of law, a mistake of fact, nor a mistake at all. It is undisputed that in the foreclosure and lease cancellation litigation, which had been removed from the Circuit Court of Nicholas County to the United States District Court for the Southern District of West Virginia, the Special Master reported to the court that the Johnsons' lien was a first lien (fol. 267).

Further, the Small Business Administration filed an Answer in which it admitted that the landlord's lien was a first lien after the costs of the suit (fol. 267). Thereafter, the Small Business Administration in April of 1960 asked to amend its Answer to assert that the lien of the Small Business Administration was ahead of the landlord's lien

(fol. 268). After the Special Master had held that the landlord's lien was a first lien an exception to his report was taken by the Small Business Administration to the United States District Judge for the Southern District of West Virginia (fol. 268). The exception was argued and the Judge announced his opinion that the landlord's lien was the first lien in West Virginia (fols. 268-269). Only after the decision in *Small Business Administration v. McClellan, supra,* and after a petition for rehearing was filed by the Small Business Administration did Judge Field, the Judge of the United States District Court, state that he would "*have*" to reverse his opinion and that he would "*have*" to hold that the Small Business Administration lien was a first lien and the landlord's lien of the Plaintiff was a second lien (fols. 271-272). (Emphasis supplied)

From the foregoing it is obvious that the belief of the parties that the Plaintiff's landlord's lien was a first lien under the laws of West Virginia on September 9 and September 24, 1959, was not mistaken, either as to law or fact. It was in fact a first lien. In law, as the United States District Court in West Virginia so held, it was a first lien until the *McClellan* case, *supra,* on December 5, 1960, caused the lien to become a second one.

The general law in such circumstances is as follows:

> "Every contract is said to be made with reference to the law in force at the time of its making, hence the rule, as it is usually stated, that the validity of an agreement depends on the state of the law at the time it was entered into. Similarly, a contract will be construed according to the law of the state, as interpreted by its courts, at the time the contract was made, and not in accordance with subsequent contrary decisions." 17 C.J.S. 355, Contracts, Section 22.

As this was a West Virginia contract, in that it was entered into in West Virginia, required performance in West Virginia and concerned an interest in real property located in West Virginia, the law of that state is to be

looked to concerning not only the validity but the interpretation to be placed upon the contract. *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112; *Gossard v. Gossard*, 149 F.2d 111 (10th Cir. Colo.); *Peoples State Bank of Crown Point, Indiana v. Jeffries*, 99 W.Va. 399, 129 S.E. 462; 17 C.J.S. 782, Contracts, Section 330.

The law of West Virginia follows the general expression above made, as seen by the following extracts of an opinion of the West Virginia Supreme Court in *State ex rel Town of South Charleston et al. v. Partlow*, 133 W.Va. 139, 55 S.E. 2d 401 (1949):

> "The validity of the contract must be determined by the law in force at the time it was made, 17 C.J.S. Contracts, Section 22; Elliott, Commentaries on the Law of Contracts, Section 683; Belleville Advocate Printing Company v. St. Claire County, 336 Ill. 359, 168 N.E. 312; Islais Company v. Mathison, 3 Cal.2d 657, 45 Pac.2d 326; Turner v. Trial, 24 Okl. 135, 103 Pac. 575; Schaun v. Brandt, 116 Md. 560, 82 A. 551; Stewart v. Thayer, 168 Mass. 519, 47 N.E. 420, 60 Am. St. Rep. 407; Pacific Gauno Company v. Dawkins, 57 Ala. 115; Miller v. State, 54 Ala. 155; and not when performance is required by its terms. See 13 C.J. 425, 17 C.J.S. Contracts, Section 211; Bias v. Atkinson, 64 W.Va. 486, 63 S.E. 395; Poling v. Board of Education of Philippi Independent District, 56 W.Va. 251, 49 S.E. 148; State ex rel Spillman v. First National Bank of Nickerson, 114 Neb. 423, 207 N.W. 674, 45 A.L.R. 1418."

Other states uniformly follow the rule as illustrated by the following cases:

In *Mercantile Trust and Deposit Company v. Columbus*, C.C.A. Ga., 161 Fed. 135 (1908) the United States District Court in construing the validity and enforceability of a contract by the City of Columbus stated:

> "The decisions of the Supreme Court of the state (Georgia) of recent years have been to the contrary but this could not affect the contract, if, at the time it

was made, the decisions of the Supreme Court were as stated."

In *Belleville Advocate Printing Company v. St. Claire County*, 331 Ill. 359, 168 N.E. 312 (1929) the court stated:

". . . It is elementary that a contract should be construed and its validity determined under the law existing at the time the contract was made."

In *Islais Company Ltd. v. Mathison*, 3 Cal.2d 657, 45 Pac.2d 326 (1935) the court stated:

"The obligations of the contract are determined by the law in effect at the time the contract was made. W. B. Worthen Company ex rel Board of Commissioners of State Improvement District No. 513 of City of Little Rock, Arkansas et al v. Kavanaugh, 55 Sup. Ct. 555, 556, 76 L.Ed."

In *State of Washington et al. v. Maricopa County, Arizona et al.*, 152 Fed.2d 556, Cir.Ct. of Appeals 9th Circuit 1945, the statement is made:

"Contracts are made with reference to existing law and cannot be impaired by it, Cross Lake Shooting and Fishing Club v. La., 224 US 632, 638, 639, 32 Sup. Ct. 577, 56 L.Ed. 924, even if the law has been given a changed construction by the state court. Tidal Oil Co. v. Flanagan, 263 US 444, 44 Sup. Ct. 197, 68 L.Ed. 382." (cert.den. 327 US 799)

In *Graves County Water Co. v. Ligon*, 112 Ky. 775, 66 S.W. (1902) the court stated:

"The cases above referred to were decided by this court in the year 1889, or two years before the contract now before us was made. The rule thus three times announced by this court was recognized as that of the state at the time the contract before us was made, and we must presume that the parties to the contract contracted with reference to the law as it had then been declared by this court. To give a different effect now to the words which they used from that which they at the time understood was the legal operation of the contract would be to make for them a contract different

from that which they themselves made; for when they used words which, under the law as it had then been declared, created a certain obligation, it must be presumed that they intended to create this obligation."

The rule enunciated by the foregoing cases is also the law of Colorado. See *New Brantner Ditch Co. v. Kramer*, 57 Colo. 218, 141 Pac. 498 (1914). The Court, at page 230, stated:

"We agree with counsel that a law in force when a contract is made is as much a part of the contract as though incorporated in it."

See also *First National Bank v. Arthur*, 10 Colo. App. 283, 50 Pac. 738; and *Cochran v. Pacific States Life Insurance Co.*, 93 Colo. 462, 27 Pac. 196. See also 12 Am. Jur. 769, Contracts, Section 240.

Even if the question of the priority of the landlord's lien could be considered as a mutual mistake of law, such does not make the contract unenforceable by the Plaintiffs.

"A mistake of law may be defined as an erroneous construction respecting the legal effect of known facts. It is laid down in general language in many cases that a mistake, in order that it may affect a contract, must be a mistake of fact, and that a mere mistake of law will not affect enforceability of an agreement; and this is well settled as a general rule, not only at law but also in equity. Contracts made on the faith of the law as enunciated in a decision of a court of last resort, in the absence of fraud, misrepresentation or want of knowledge of all of the facts, will not be set aside because of a subsequent decision by the same court overruling the former one." 17 C.J.S. 500, Contracts, Section 145.

Even if the parties had not been as certain of and correct as to the facts and law as the evidence shows they were, such would not invalidate their agreement. In *Davis v. Miller*, 103 Colo. 586, 87 Pac.2d 492, this Court stated:

"Where the parties know that the legal effect of known facts is uncertain and base their agreement on

> that assumption it is clear that a mistake of law does not affect the validity of their agreement. 12 Am. Jur. 635, Section 140."

Other Colorado cases also holding that a mistake of law is not grounds for rescission are *First National Bank v. Shank*, 53 Colo. 446, 128 Pac. 56; *Bowles v. Miller*, 96 Colo. 145, 40 Pac. 2d 243; *Edwards v. Edwards*, 113 Colo. 390, 157 Pac. 2d 616; and *Denver Union Stockyard Company v. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees*, 48 Fed. Sup. 308 (District Court, Colorado).

To the same effect are *Granger v. Granger*, 41 N.Y.S. 2d 422, 179 Misc. 659; *Brown v. Utica Mutual Insurance Co.*, 53 N.Y.S.2d 760.

APPENDIX D

TRIAL COURT'S OPINION AND JUDGMENT.

THE COURT: At this time the Court is prepared to rule on the motion to dismiss, prefacing its ruling with the remark that it is considering the testimony given to this point in the light most favorable to the plaintiff; and considering, of course, only testimony and not the arguments of counsel or statements of counsel.

It is the opinion of the Court that this case must turn on the language of Exhibit C, which is denominated Memorandum of Agreement.

Now, as to Exhibit VV, which was discussed in the argument, the Court feels that these notes prepared by Mr. Ray are no more than his own summary of the views of the parties, and could not be binding on anyone.

The testimony thus far shows the carrying out of steps leading to the leasing of the Johnson coal properties to the defendant, and payment therefor by him measured by certain sums due to the plaintiffs or to be expended by the plaintiffs. However, all of this was premised on the mistaken belief that the plaintiffs held a first lien on the property of J F Coal Corporation. This mistake the Court finds to have been one of both law and of fact. Although there were elaborate negotiations over an extended period of time the plaintiffs did not either by payment or by settlement of the SBA claim place themselves in the position of being first lienors; and when the contemplated foreclosure sale was held, the SBA and not the plaintiffs had the prior lien.

Under this set of facts, and under the cases, it would appear that the defendant at this point could have elected to proceed, in effect, on a new contract, a different contract than that which was in the contemplation of the parties at the time of their conference. He chose to decline, and,

therefore, the Court holds there was not and is not at this time a binding contract between these parties.

The motion to dismiss is granted. A Motion for New Trial is ordered dispensed with. Plaintiffs may have sixty days within which to lodge a reporter's transcript.

APPENDIX E

PETITION FOR REHEARING IN COLORADO SUPREME COURT.

Plaintiff in Error respectfully petitions for a rehearing herein for the reason that the Court has overlooked or misapprehended certain matters in this appeal.

The Court held that the trial court was correct in granting the Defendant in Error's motion for an involuntary dismissal at the conclusion of presentation of Plaintiff in Error's evidence on the ground that there was a mutual mistake of both law and of fact as to the priority of Plaintiff in Error's Assignor's Landlord's Lien under the West Virginia Statutes.

It is respectfully submitted that in affirming the trial court's ruling this Court has overlooked matters set forth on pages 20 to 22 of Plaintiff in Error's Brief to the effect that:

1. The Small Business Administration prior to making its loan recognized the priority of the Landlord's Lien in West Virginia.

2. At the outset of the foreclosure proceedings in West Virginia the Small Business Administration in its Answer admitted the landlord's priority.

3. After amendment of the Small Business Administration's Answer to assert the priority of its lien, the Special Master appointed by the United States District Court for the Southern District of West Virginia found that the Landlord's Lien was senior.

4. Upon an exception being taken to the report of the Special Master, the Judge of the United States District Court determined that the Landlord's Lien was the first lien in West Virginia.

5. Only many months after the making of the contract in question did the United States District Court reverse its opinion, and then solely on the basis of feeling bound by the decision of the United States Supreme Court in the McClellan case decided on December 5, 1960 (the contract in question having been entered into on September 9, 1959).

Accordingly, it is respectfully submitted that the statement in this Court's opinion appearing on page 11 as to the failure of Plaintiff in Error to direct its attention to any judicial declaration that a West Virginia Landlord's Lien ever had priority over a lien of the Small Business Administration is erroneous.

It is therefore respectfully submitted that this Court's opinion has overlooked the law and the facts as they existed in West Virginia at the time of the making of the contract and has misapprehended the effect of the McClellan decision in its changing of the law in West Virginia subsequent thereto.

It is further respectfully submitted that this Court overlooked or misapprehended the state of mind of the Defendant in Error at the time of the making of the contract of September 9, 1959, in regard to the materiality of the priority of the Landlord's Lien. As is pointed out on pages 30 to 35 of the Brief of the Plaintiff in Error, from the facts as they existed on September 9, 1959, and as they developed thereafter, the priority of the Small Business Administration's lien was not material to Vickers in his negotiations as he fully expected to have to pay a substantian amount above and beyond the Landlord's Lien in order to buy up the interest of the Small Business Administration. Further, as pointed out on page 36 of Plaintiff in Error's Brief, the priority of the Small Business Administration lien was of so little consequence to Defendant in Error that such was not asserted by Defendant in Error in any of the transactions between the parties prior to the com-

mencement of the present suit nor placed in issue in it by the pleadings of Defendant in Error.

Such a belated and hypertechnical defense first injected into the matter only at the conclusion of Plaintiff in Error's evidence, if countenanced by this Court can only have the effect of permitting the Defendant in Error to unjustly escape his contractual obligations after full and complete performance by the other parties to the contract.

It is therefore respectfully submitted that a rehearing should be granted.